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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF *AMICUS CURIAE* OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* WATERFRONT COMMISSION OF NEW YORK HARBOR

Like the Delaware River and Bay Authority (DRBA), the Waterfront Commission of New York Harbor (Waterfront Commission)[1] is a bi-state agency established pursuant to the

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[1] Counsel for the respondents has consented to the filing of this brief. A letter of consent will be filed with the Clerk of the Supreme Court simultaneously with the filing of this brief.

Compact Clause of the Constitution. The Waterfront Commission is a body corporate and politic and an instrumentality of the States of New Jersey and New York (New Jersey Laws of 1953, c. 202 (N.J.S.A. 32:23-1 and following); New York Laws of 1953, c. 882 (McK. Unconsol. Laws, Sec. 9801 and following) approved by the Congress of the United States (Public Law 252, c. 407, 83rd Cong. 1st Sess.)) created for the purpose of eliminating racketeering and other criminal, corrupt and evil conditions on the waterfront in the Port of New York District, which had been publicly exposed by the New York State Crime Commission, the New Jersey Law Enforcement Council and other investigative bodies.

The Waterfront Commission fully supports the Petition for Certiorari filed by the DRBA because the decision of the Supreme Court of New Jersey in this case contravenes established law concerning interstate agencies and conflicts with the New York high court's decision in *Malverty* v. *Waterfront Commission of New York Harbor*, 71 N.Y. 2d 977, 529 N.Y.S. 2d 67, *rearg. den.* 72 N.Y. 2d 910, 532 N.Y.S. 2d 758 (1988) and, in the words of the DRBA at page 22 of its Petition, "creates enormous confusion and uncertainty as to which particular laws apply to interstate authorities" such as the Waterfront Commission.

SUMMARY OF ARGUMENT

Under established Compact Clause principles, any amendment to an interstate compact established pursuant to the Compact Clause of the Constitution must be accomplished by specific legislation enacted by the compacting states. Similar legislation or policy from the compacting states that is not specifically made applicable to the particular bi-state agency is not and cannot be binding upon the agency. This rule was expressly recognized by New York's Court of Appeals in *Malverty v. Waterfront Commission of New York Harbor*, 71 N.Y. 2d 977,

529 N.Y.S. 2d 67, *rearg. den.* 72 N.Y. 2d 910, 532 N.Y.S. 2d 758 (1988). The diametrically opposite holding of the Supreme Court of New Jersey in the instant case places the Waterfront Commission, an instrumentality of New York and New Jersey, in an untenable position. In New Jersey, the Waterfront Commission may be subjected to any number of additional obligations or duties merely implied by courts from the general laws or policies of the compact states. In New York, however, the Commission may not be subjected to such implied obligations or duties. The conflicting obligations placed on this Commission in each state will result in conflict and confusion, and thus threaten the important regulatory and law enforcement mission entrusted to the Waterfront Commission by the compact states and Congress.

ARGUMENT

DRBA'S PETITION FOR CERTIORARI SHOULD BE GRANTED

A. *Powers And Functions Of The Waterfront Commission*

To combat racketeering and other invidious criminal activities on the waterfront of New York harbor, as catalogued in the Waterfront Commission Compact (*see e.g.* N.J.S.A. 32:23-2 through 5; McK. Unconsol. Laws, Secs. 9802 through 9805), the states of New York and New Jersey formed the Waterfront Commission as a bi-state agency through a compact approved by Congress. The Commission is empowered by identical legislation enacted by New Jersey and New York to combat crime and corruption by, among other things, registering and licensing various categories of dock workers and firms engaged in stevedoring activities along the waterfront in both New York and New Jersey. The agency exercises wide regulatory and criminal

investigatory and subpoena powers throughout New York and New Jersey and maintains a force of law enforcement offieers who have full police powers in both jurisdictions. The Waterfront Commission is also empowered to remove certain convicted waterfront union officials, agents and employees from office on both sides of the Hudson River pursuant to Section 8 of the Waterfront Commission Act. (N.J.S.A. 32:23-80, 80.2, McK. Unconsol. Laws, Sec. 9933. See *Carson v. Waterfront Commission*, 73 F. 3d 24 (3rd Cir. 1995), *cert.* den ___U.S.___, 116 S.Ct. 1828 (1996); *Local 1804, Longshore Ass'n v. Waterfront Commission*, 85 N.J. 606 (1981)). In fulfilling its Congressionally-authorized mission, the Waterfront Commission and its employees have combated numerous types of corruption and criminal activity in New York and New Jersey.

B. *Any Amendment To The Waterfront Commission Compact Must Be Accomplished By Specific Legislation Enacted By Both New Jersey And New York*

Like the DRBA Compact, (Article VIII, Petition, pp. 80a and 81a), neither New Jersey nor New York can unilaterally amend the Waterfront Commission Compact. Thus, Article XVI, Section 1 of the Waterfront Commission Compact provides that:

> Amendments and supplements to this compact to implement the purposes thereof may be adopted **by the action of the Legislature of either State concurred in by the Legislature of the other.** [N.J.S.A. 32:23-70; McK. Unconsol. Laws, Sec. 9870] (emphasis added).

The compacting States have carefully adhered to this process. For example, the agency's authority to grant immunity (N.J.S.A. 32:23-86 (5), McK. Unconsol. Laws, Sec. 9906 (5)),

was authorized by both states subsequent to the enactment of the Compact. As noted by the Supreme Court of New Jersey in *In re Application of Waterfront Comm. of N.Y. Harbor*, 39 N.J. 436, 452 (1963), *aff'd in part and vacated in part Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52 (1964):

> The immunity subdivision quoted above was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (New York Laws 1957, 188) as an agreement between the two States supplementary to the Waterfront Commission Compact and amendatory thereof. This legislation was enacted pursuant to the provisions of Article XVI, Section 1 of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. N.J.S.A. 32:23-70. Thus, the immunity subdivision is in effect a part of the original Waterfront Commission Compact, to which Congress gave its consent.

Thus, as is true with respect to the DRBA Compact, to effectively bind the Waterfront Commission, amendments and supplements to the Waterfront Commission Compact must be enacted by conscious and deliberate acts of the legislatures of both States. Absent the above-noted specific legislative authority to grant immunity, the general statutory immunity provisions of both states could not be applied to the Waterfront Commission. See N.J.S.A. 2A:81-17.3 (Order compelling person to testify or produce evidence; immunity from use of such evidence; contempt) and Article 50, McK. Criminal Procedure Law (Compulsion of Evidence by Offer of Immunity).

The foregoing principle is clearly supported by the opinion of New York's Court of Appeals in *Malverty v. Waterfront Commission of New York Harbor*. In *Malverty,* the appellant, a dockworker whose registration had been revoked by the Waterfront Commission, contended that the agency erroneously ignored the relevant provisions of Article 23-A of New York's Correction Law relating to the employment of former inmates. He argued in his Motion for Leave to Appeal that since both New York and New Jersey enacted laws prohibiting discrimination in employment against rehabilitated convicted offenders, the Commission, as a creature of the compacting states, was required to abide by this public policy of the two states.

The Court of Appeals flatly disagreed and held that the provisions of New York's Article 23-A do not apply to the Waterfront Commission even though New Jersey evinced the same or similar public policy regarding employment opportunities for former inmates. New York's high court recognized that:

> The Waterfront Commission was established by Interstate Compact, approved by Congress (67 U.S. Stat. 541) ***
>
> New York and New Jersey have agreed, and Congress has authorized the two States to amend and supplement the Interstate Compact, to implement the purposes thereof, by legislative action of either State concurred in by legislative action of the other State (McKinney's Uncons. Laws of N.Y. Sec. 9870). Pursuant to sections 9806 and 9905(7), the "Compact" between the two States includes the Interstate Compact approved by Congress and any duly enacted amendments or any supplements thereto. In the past, the New York Legislature has expressly

stated that certain legislation was amending a certain portion of the "Compact" and that the new law would take effect upon the enactment into law by New Jersey of legislation having an effect identical to New York's legislation, unless New Jersey had already done so, in which case the amendment would take effect immediately.

In the present case, the absence from the text and legislative history of article 23-A of any reference to the Waterfront Commission, coupled with the absence of an express statement that the Legislature was amending or supplementing the provisions of the "Compact" and that article 23-A would take effect upon the enactment by New Jersey of legislation of identical effect, if it had not already done so, indicates that the New York Legislature never intended article 23-A to apply to the Waterfront Commission. **That the two States have evinced the same or similar, public policy regarding employment opportunities for former inmates by enacting similar "antidiscrimination" laws (see NJ. Stat. Annot. Sec. 2A:168A-1 et seq. ["Rehabilitated Convicted Offenders Act"]) is not sufficient under the express terms of the "Compact" to render it properly amended or supplemented such that the Commission would be subject to the provisions of article 23-A.** Respondent, therefore, did not err in failing to apply article 23-A in denying petitioner's application for restoration of his checker registration. 529 N.Y.S. 2d at 68 (emphasis added).

Thus, the high courts of New York and New Jersey have reached opposite results after considering the issue presented by this case. These completely opposite determinations from the highest courts of the respective compacting states present the real potential of wreaking havoc with the orderly operations of the Waterfront Commission's regulatory and law enforcement mission. For example, because Mr. Malverty sued the Commission in New York, the agency was not required to consider New York's statutory scheme pertaining to "rehabilitated convicted offenders" in determining whether to grant his petition to restore his checker's registration. Given the determination of the New Jersey Supreme Court in the within matter, however, a suit instituted by Mr. Malverty in New Jersey, could have resulted in a completely opposite determination, that is, the obligation upon the Waterfront Commission to consider New Jersey's Rehabilitated Convicted Offenders Act in respect to Mr. Malverty's petition for restoration. The Waterfront Commission is now left to guess which laws govern its licensing decisions—a matter that directly threatens the Commission's ability to conduct its important regulatory and law enforcement mission.

C. *Other Practical Considerations Illustrate The Conflicts Caused By The New Jersey High Court's Decision.*

1. The conflicting decisions of the New Jersey Supreme Court in this case and the New York high court in *Malverty* create substantial problems for the Waterfront Commission. For example, the Commission licenses port watchmen which are defined to include:

> any watchman, gateman, roundsman, detective, guard, guardian or protector of property employed by the operator of any pier or other waterfront terminal or by a carrier of freight by water to perform services in such capacity on any pier

> or other waterfront terminal. (N.J.S.A. 32:23-6; McK. Unconsol. Laws, Sec. 9806).

Pursuant to statutory authorization the Waterfront Commission has enacted comprehensive regulations concerning physical and mental fitness standards for port watchmen as well as standards of conduct and requirements to be observed by port watchmen. See N.J.S.A. 32:23-10 (7); McK. Unconsol. Laws, Sec. 9810 (7), 19 N.J.A.C., Subdiv AA.Secs 5.5 through 5.19, 21 N.Y.C.R.R., Secs. 5.5 through 5.19.

In 1992, New York enacted its Security Guard Act to address issues relating to security guards working in New York. McK. General Business Law, Secs. 89-e to 89-w. Although legislation has been introduced in the New Jersey Legislature concerning the licensing of certain security officers and the registration of their employers, that legislation contains significant differences from the New York law. It should be noted that the Waterfront Commission was exempted from New York's Security Guard Act by administrative determination and that the New Jersey proposed legislation has been amended to exempt the agency. But for these exemptions, since the Waterfront Commission licenses pier guards who are employed in New Jersey and in New York, a myriad of problems could arise if the New Jersey Supreme Court's decision is left to stand and the Waterfront Commission is required to abide by security guard legislation enacted by both states.

2. Like the DRBA, the Waterfront Commission is authorized pursuant to the provisions of its Compact:

> To appoint such officers, agents and employees as it may deem necessary, prescribe their powers, duties and qualifications and fix their compensation and retain and employ counsel and private consultants on a contract basis or other-

wise; N.J.S.A. 32:23-10(5), McK. Unconsol. Laws, Sec. 9810(5).

The Waterfront Commission has recognized that New Jersey and New York have enacted comprehensive and different civil service laws governing , among many other things, the appointment, disciplining and removal of their respective state employees. See N.J.S.A.11A:1-1 et seq., McK. Civil Service Law, Sec. 1 et seq. Those laws do not cover employees of the bi-state Waterfront Commission since they specifically do not amend the Waterfront Commission Compact. Given the differences in the laws, such coverage, if it existed, would prove to be an administrative nightmare. However, under the reasoning of the New Jersey high court in this case, because the compacting states have enacted similar civil service laws or have recognized similar policies, the New Jersey courts are vested with the authority to imply numerous additional duties and obligations upon the Commission with respect to its employees. This result is not sanctioned by the Waterfront Commission Compact or the jurisprudence governing interstate compacts.

3. Moreover, the procedural requirements set forth in the Waterfront Commission Compact which empower the agency to hold administrative hearings to determine whether to grant or deny applications for registrations and licenses or to determine whether to revoke, cancel or suspend registrations and licenses differ from the requirements of New Jersey's Administrative Procedures Act and New York's Administrative Procedures Act. But for the fact that interstate agencies are specifically exempted from the operation of New York's act (Section 102(1)), the New Jersey high court's ruling implies that the Waterfront Commission may be required to comply with New Jersey's Administrative Procedures Act, even though the Compact explicitly provides the rules applicable to administrative hearings at the Waterfront Commission. The Waterfront Commission should not be burdened with determining which state laws

might apply to the agency, particularly where state law would augment, or contravene, the Commission's obligations pursuant to its Compact.

***

Before the Waterfront Commission is presented with such confusion and uncertainty, this Court should grant certiorari and resolve the conflict between the directly contrary rulings of the New York and New Jersey high courts as to the manner in which additional duties or obligations may be imposed upon a bi-state entity established pursuant to the Compact Clause with the consent of Congress.

CONCLUSION

The Waterfront Commission fully agrees with the DRBA that "because of the direct conflict of authority **[including *Malverty's* conflict with this matter]** and overriding importance of the question presented, this case plainly meets the Court's conventional criteria for certiorari." Because "this case involves a dispute concerning the construction and governance of an interstate compact—bearing directly on the construction and governance of numerous other interstate compacts **[including the Waterfront Commission Compact]**—[there is also] another, independently compelling reason to grant the writ."

For all of the foregoing reasons, the *Amicus Curiae* Waterfront Commission of New York Harbor, respectfully urges this Court to grant the DRBA's Petition for Certiorari.

Respectfully submitted,

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